

October 19-20, 2016
Hilton Lexington/
Downtown
Lexington, Kentucky

Kentucky Mineral Law Conference

*Energy
& Mineral Law
Foundation*



Program Schedule

Wednesday, October 19

7:00 a.m.

Registration Opens

7:00-9:00 a.m.

Continental Breakfast

8:45 – 9:00 a.m.

Welcome and Introductions

- Daniel W. Wolff, Foundation President, *Crowell & Moring LLP*, Washington, DC
- Karen J. Greenwell, Program Chair, *Wyatt, Tarrant & Combs, LLP*, Lexington, KY

9:00 – 9:45 a.m.

Keynote Address

- Charles G. Snavely, Secretary, Energy & Environmental Cabinet, *State of Kentucky*, Frankfort, KY

9:45 – 10:30 a.m.

Fossil Fuels and the Presidency: Policy, Politics, and Poppycock

This program will look at the constitutional and other legal authority available to the executive branch of the federal government to influence the development of fossil fuels, and examine how the outcome of the presidential election might influence the direction the country takes with regard to fossil fuel development in the years to come..

- Daniel W. Wolff, *Crowell & Moring LLP*, Washington, DC

10:30 – 10:45 a.m.

Break

10:45 – 11:40 a.m.

Renewables – Coming to the Grid Near You!

Renewable energy is making its way into even the most fossil fuel-intensive areas of the country’s electricity grid. A variety of sources of renewable generation is in place or in development in Appalachia, Ohio, Indiana and Illinois, including hydroelectric, solar, and wind projects, among others. This panel presentation will discuss the types of renewables that are currently used or are being developed in these regions, and how they are impacting fossil fuel generation, the grid, and electric rates and rate structures. The panelists will also examine the legal, political, and practical effects of renewable development, including insights into utility decision-making involving renewables.

- Elizabeth Turgeon Schindzielorz, Moderator, *Robinson & McElwee, PLLC*, Charleston, WV
- Mark L. “Buzz” Belleville, Associate Professor of Law, Director, Natural Resources Law Center, *Appalachian School of Law*, Grundy, VA
- John P. Malloy, Vice President, Customer Service, *Louisville Gas & Electric and Kentucky Utilities*, Louisville, KY
- James M. Van Nostrand, Professor of Law, *West Virginia College of Law*, and Director, *Center for Energy and Sustainable Development*, Morgantown, WV

11:40 a.m. – 12:25 p.m.

Energy Law Update

This session will provide an overview of recent cases impacting the energy sector.

- Carrie J. Lilly, *Bowles Rice LLP*, Morgantown, WV

12:30 – 1:45 p.m.

Hosted Luncheon

- Speaker invited



Wolff



Greenwell



Snavely



Schindzielorz



Belleville



Malloy



Van Nostrand



Lilly

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Past President Members

Kevin K. Douglass
Babst Calland
Pittsburgh, PA

G. Brian Wells
Wyatt, Tarrant & Combs, LLP
Lexington, KY

1:45 – 2:30 p.m.

Cyber and Physical Security: Lessons Learned from the Electric Industry

One of the most pervasive parts of the regulation of the reliability of bulk power developed over the last 10 years has been with respect to critical infrastructure protection and security. This presentation will review this evolution and the expansion of this regulation. It will address the political forces and current events (including, armed and cyberattacks on electric facilities) that have shaped this regulation, and broader implications for security in other critical infrastructure sectors and business in general.

- Joel deJesus, *Dinsmore & Shohl LLP*, Washington, DC



deJesus

2:30 – 3:15 p.m.

FAST or Slow? Streamlined NEPA Review for Energy Projects and the Linger Uncertainty Over Consideration of Greenhouse Gas Impacts

NEPA review can present a significant hurdle to development of renewable energy, conventional energy, and energy transmission projects that involve any sort of federal permitting, approval, or funding. The “FAST Act” was designed to simplify and accelerate the NEPA review process for energy projects, but recently released guidance from the President’s Council on Environmental Quality expands the scope of consideration of greenhouse gas impacts in NEPA reviews and threatens to slow down this process. This presentation will include a brief overview of the NEPA process, a discussion of how NEPA may apply to a variety of energy projects, a review of the recent changes to the relevant statutes and guidance, and comments on the treatment of these issues by the courts.

- Timothy J. Hagerty, *Frost Brown Todd LLC*, Louisville, KY
- Emily C. McKinney, *Frost Brown Todd LLC*, Louisville, KY



Hagerty



McKinney

3:15 – 3:30 p.m.

Break

3:30 – 4:30 p.m.

Alcohol and Drug Addiction: Ethical Issues with Impaired Attorneys

A recent survey by the American Bar Association shows that attorneys suffer from addictions at much higher rates than the general public. This presentation will address the numerous ethical issues implicated with impaired attorneys and steps which can be taken to protect clients and provide help to these attorneys. It will detail the services available through various bar association lawyers’ assistance programs.

- John M. Williams, *Rajkovich, Kilpatrick, Williams & True, PLLC*, Lexington, KY



Williams



Harvey

4:30 – 5:30 p.m.

Corporate Counsel Roundtable

The purpose of the panel is for in-house counsel to offer advice to outside counsel (and potential outside counsel) about their expectations of legal representation. Panel members will discuss specific examples of preferred and disfavored conduct observed from outside counsel, including proper case management, budgeting, appropriate communication and quality of legal work. Panel members will provide insight about their roles with their clients and how outside counsel can facilitate those relationships.

- M. Shane Harvey, Moderator, *Jackson Kelly PLLC*, Charleston, WV
- Elizabeth E. Nicholas, General Counsel, *Blackhawk Mining, LLC*, Lexington, KY
- David W. Wagner, Senior Counsel, *CONSOL Energy Inc.*, Canonsburg, PA
- Andrew B. McCallister, VP and Assistant General Counsel, *Alpha Natural Resources, Inc.*, Julian, WV
- Benjamin M. Sullivan, Associate General Counsel, *Energy Corporation of America*, Charleston, WV



Nicholas



Wagner

5:30 – 7:00 p.m.

Reception

Thursday, October 20, Track 1

7:00-8:00 a.m.

Continental Breakfast

8:00 – 8:50 a.m.

EPA’s Growing Influence Over State and Federal Section 404 Permits

The Environmental Protection Agency’s “backstop” authority over state and federal agency decisions to issue Clean Water Act Section 404 discharge permits is far-reaching, and appears to be growing. A recent decision from the U.S. Court of Appeals for the District of Columbia Circuit held EPA could “deny”, “restrict”, or “withdraw” such authorizations both before and after a permit is issued. This expansive veto authority can lead to significant lost investment on the back end or chill necessary investment in a project on the front end. This presentation will explore the boundaries of EPA’s veto authority and focus on how EPA is influencing project size, scope and design, and extracting extraordinary mitigation with the threat of a permit veto.

- Karen C. Bennett, *Clark Hill PLC*, Washington, DC



McAllister



Sullivan



Bennett

8:50 – 9:40 a.m.

Jurisdictional Determinations and Due Process Under the Clean Water Act

Determining whether a property has a sufficient nexus with waters of the U.S. to bring it within the scope of the Clean Water Act (CWA) can be very difficult, and the consequences of an incorrect determination by a landowner can be Draconian. The U.S. Corps of Engineers will provide a landowner with a jurisdictional determination of the applicability of the CWA, but questions have remained regarding the landowner's ability to challenge such a determination prior to completing the permitting process. This presentation will provide a detailed analysis of the recent U.S. Supreme Court decision in *U.S. Corps of Engineers v. Hawkes* decision and a discussion of its practical implications for any project that might require a CWA permit.

■ Allyn G. Turner, *Steptoe & Johnson PLLC*, Charleston, WV



Turner



Harris

9:40 – 10:00 a.m.

Break

10:00 – 10:50 a.m.

EPA's Energy Extraction Regulatory and Enforcement Initiative: The Storm is Here

EPA and certain states have enacted a host of new regulations and increased enforcement concerning emissions of methane and volatile organic compounds (VOCs) from tanks, pressure relief devices, and other components of upstream and midstream facilities, such as found in 40 C.F.R. Part 60 Subpart OOOO and OOOOa. This will be a practical discussion that both explains the new regulations, the implications for compliance, and tips and strategies for proactively preparing for and defending against EPA and state enforcement initiatives against the upstream and midstream industries. A particular emphasis will be Leak Detection and Repair (LDAR) requirements and how to comply

■ Colin G. Harris, *Faegre Baker Daniels*, Boulder, CO



Nuttall



Barr

10:50 – 11:40 a.m.

NORM and TENORM — Are We Heading for a New Legal Normal?

A by-product of oil production is naturally occurring radioactive material (NORM), and its disposal in connection with primary recovery has historically not been unduly problematic for the oil industry. Waterfloods and hydraulic fracturing can enhance the level of radioactive material creating technologically enhanced radioactive material (TENORM). This presentation will provide an overview of the science of NORM and TENORM, discuss generally the regulatory frameworks currently in place in representative states, and provide examples of operators' experiences in dealing with NORM and TENORM generation and disposal.

■ Brandon C. Nuttall, *Kentucky Geological Survey*, Lexington, KY

■ Karen J. Greenwell, *Wyatt, Tarrant & Combs, LLP*, Lexington, KY

■ William G. Barr III, Managing Partner, *BlackRidge Resource Partners LLC*, Lexington, KY



Kurdock



Howes

11:45 a.m. – 1:15 p.m.

Lunch on your own – Committee Luncheons and Law School Luncheon

1:15 – 2:00 p.m.

Change Is Coming: 2016 Pipeline Safety Regulatory and Legislative Update

The U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA) currently has several significant rulemakings pending. In addition, in June 2016, Congress passed the PIPES Act (Protecting our Infrastructure of Pipelines and Enhancing Safety Act of 2016) introducing a number of new congressional mandates covering pipeline safety. A former PHMSA attorney and regulatory counsel to an industry trade association will discuss what you need to know about the potential changes to the regulations affecting natural gas pipelines.

■ Brianne K. Kurdock, *Babst Calland*, Washington, DC

2:00 – 2:45 p.m.

Natural Gas Liquids (NGL) Contract Terms — What You Should Care About

This presentation will discuss some of the primary provisions found in, and issues relating to, some of the contracts central to the processing and transportation of natural gas liquids. It will include a review of the various pricing mechanisms for processing (take-in-kind, percentage of proceeds, make whole, fee for processing) as well as common issues such as those involving the use of affiliates, gas and NGL title problems and processing plant and pipeline capacity limits and access rights.

■ Dwight A. Howes, *Reed Smith LLP*, Pittsburgh, PA

2:45 – 3:00 p.m. Break

3:00 – 3:45 p.m. **The Growing Irritation of Energy-Related Nuisance Claims — Air Emissions, Noise, Earthquakes, Water Contamination, and Health**

As a natural consequence of energy projects being located near residential areas, the energy industry has begun to experience an increase in nuisance and negligence claims filed by landowners. This presentation will discuss recent cases, including *Ely v. Cabot Oil & Gas Corp.* in which a Pennsylvania jury handed down a \$4.24 million verdict, and the potential for these recent cases to forecast how future cases may be decided. It will examine emerging trends in the types of claims being pursued, the threat of mass litigation, and defense trends.

- Kara S. Eaton, *Frost Brown Todd LLC*, Pittsburgh, PA
- Andrew G. Jenkins, *Frost Brown Todd LLC*, Pittsburgh, PA



Eaton



Jenkins

Track 2

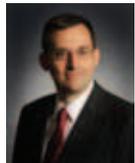
8:00 – 8:50 a.m. **Bad Faith Trespass to Oil and Gas: Pennsylvania’s Standard Under *Sabella v. Appalachian Dev. Corp.***

For over 110 years, Pennsylvania courts determined whether a trespass to oil and gas was in good faith or bad faith by looking to the trespasser’s subjective intent. In 2014, the Pennsylvania Superior Court moved away from that subjective standard and incorporated an objective element concluding that a trespasser with constructive notice acted in bad faith. This presentation will provide a broad overview of trespass law, the standards for judging a trespass willful, including how a finding of bad faith affects damages, and implications of *Sabella* on developers in Pennsylvania and in the Appalachian Basin.

- Brian J. Pulito, *Steptoe & Johnson PLLC*, Meadville, PA
- Nathaniel I. Holland, *Steptoe & Johnson PLLC*, Meadville, PA



Pulito



Holland

8:50 – 9:40 a.m. **When Non-Operators Fail to Pay: Issues Arising Under Joint Operations**

There is little guidance in the Appalachian Basin on the many questions that can arise in joint operations. What standard will govern the operator’s conduct? What remedies are available in the event a party fails or refuses to pay its share of the joint operating expenses? Are those remedies available even when there is no operating agreement? How can you minimize risks if a participant cannot pay its obligations? This presentation will examine how various courts have addressed these and other issues as well as various joint operating agreement provisions.

- Gregory D. Russell, *Vorys, Sater, Seymour and Pease LLP*, Columbus, OH
- Webb I. Vorys, *Vorys, Sater, Seymour and Pease LLP*, Columbus, OH



Russell



Gold

9:40 – 10:00 a.m. Break

10:00 – 10:50 a.m. **The Recent Employment Law Earthquake**

The employment and wage and hour law landscape changed dramatically in the past year. Independent contractors may be employees now. Exempt salaried employees may be hourly now. There are new guidelines on the rights and protections of new classifications of employees, and new issues regarding benefits — such as dealing with medical marijuana. Even if you are not an “employment lawyer,” understanding these employment law basics will help you better assist your clients.

- Sharon L. Gold, *Wyatt, Tarrant & Combs, LLP*, Lexington, KY



Irwin

10:50 – 11:40 a.m. **Access Rights from Start to Finish**

The negotiation of access rights is a material issue for both landowners and miners. Landowners need to guard against risks arising from the coal company’s operations — including risks that may remain after termination of a lease — while operators need to ensure that they have the full scope of rights that they need to conduct their operations safely and efficiently. This overview will address the negotiation and drafting of a variety of access agreements, with a view toward mitigating risk and avoiding future conflicts.

- Kerry O. Irwin, *Dinsmore & Shohl LLP*, Lexington, KY

11:45 a.m. – 1:15 p.m. **Lunch on your own – Committee Luncheons and Law School Luncheon**

1:15 – 2:00 p.m.

Treatment of Leases, Contracts and Other Interests in Mineral Company Bankruptcy Cases

This presentation will provide a practical examination of the different ways bankruptcy courts have treated or might treat different types of contracts and property interests. It will focus on how bankruptcy courts have characterized and dealt with oil and gas leases, coal leases, royalty interests, overriding royalty interests, contracts for oil and gas transportation, and other contracts common in the energy industries, and the rationale for their varying treatment.

■ Daniel L. Waxman, *Wyatt, Tarrant & Combs, LLP*, Lexington, KY



Waxman

2:00 – 2:45 p.m.

Wading Through the Opaque in a Transparent Process: Understanding the Potential Impact of Various Events in Coal Industry Bankruptcy Cases

Typical issues related to sales and/or reorganizations, leases, contracts, and federal and state liabilities that arise in most business bankruptcy cases may become atypical in coal industry bankruptcy cases. Post-bankruptcy, parties engaged or previously engaged in business with coal debtors may be left confused by the scope of sale and/or confirmation orders, whether and to what extent leases and contracts have been assumed and assigned, and who remains responsible for certain federal and state liabilities. While at first glance it may seem that bankruptcy may leave these issues murky, the bankruptcy process is clear as to how it handles each of these matters. This session will focus on knowing where to look and how to determine the impact of a bankruptcy case in the coal industry.

■ Adam R. Kegley, *Frost Brown Todd LLC*, Lexington, KY



Kegley

2:45 – 3:00 p.m.

Break

3:00 – 3:45 p.m.

MSHA's Right to Company Records in 110(c)/105(c) Investigations, Accident Investigations and Part 50 Audits

This presentation will address the Mine Safety and Health Administration's (MSHA) right to obtain records in the most common scenarios mining companies and contractors face – accident investigations, Part 50 audits, 110(c) investigations to assess civil penalties on agents of the operator, and 105(c) discrimination investigations. This session will also discuss whether current case law is moving towards an administrative subpoena for MSHA. Along with recent developments, the presentation will also discuss various hypothetical scenarios for record requests and how companies can respond.

■ Mark E. Heath, *Spilman Thomas & Battle, PLLC*, Charleston WV

■ Jeffrey K. Phillips, *Steptoe & Johnson PLLC*, Lexington, KY



Heath



Phillips



Enjoy Lexington

Located at the heart of Central Kentucky's famed scenic Bluegrass Region, Lexington is known around the world for its role in producing champion racehorses and fine bourbon. The location of the conference hotel brings you close to a lot of activities in the area.

In the Bluegrass, you can meet previous Derby champions — or perhaps catch a glimpse of a future winner on the world's most famous horse farms. The fall season for Keeneland Race Course, a beautiful park reminiscent of those in England, runs from October 7 through 29; first post is at 1:05 each race day. There is no racing Monday or Tuesday.

See nearly 50 breeds of horses, plus museums, art galleries, shows and demonstrations at the 1,200-acre Kentucky Horse Park or take a Horse Farm Tour where you can meet four-footed celebrities in their own homes. You won't believe the lifestyle of the area's most famous residents!

Visit the home of true Kentucky bourbon. The time-honored methods developed in the early 19th century are still used in the distilleries today. The course of bourbon history has changed as Alltech opened its \$9.2 million distillery. Located next to the company's brewery at the corner of Maxwell and Cross Streets, it is believed to be one of only a few sites in the world with both a distillery and brewery. Tours are available seven days a week, 10 a.m. to 4 p.m.

You can visit four period Historic Homes of the area's most famous citizens — Mary Todd Lincoln, Henry Clay, John Hunt Morgan and Joseph Bryan, a grand-nephew of Daniel Boone.

Many fine restaurants are within walking distance of the Hilton; ask the concierge for directions.



Yes, I want to attend the Kentucky Mineral Law Conference

The full conference registration includes all program materials in electronic format online, continental breakfasts, Wednesday lunch, refreshment breaks and hosted reception on Wednesday. Registrants choosing to have program materials in loose-leaf binder at the time of the program for an additional \$65 should mark that choice on the registration form.

Registration fees	Conference through Oct. 1	Conference after Oct. 1
Non-member Registration Fee	\$590	\$650
EMLF Member	\$425	\$475
Government and Young Lawyer (3 years or less)	\$325	\$375
Law Students and Retirees	\$100	\$100
Printed Program Materials (Conference Registrants Only)	\$65	\$65

First Name _____ M.I. ____ Last Name _____ Badge Name _____

Organization/Firm _____ Title _____

Address _____

City, State, Zip _____

Daytime Phone _____ Fax # _____

Email Address _____

State(s) for CLE Credits _____ Do you need AAPL Credit? _____

Fees:

Conference Registration \$ _____

Hard Copy Notebook \$ _____

Total \$ _____

Conference accreditation is pending from states with mandatory Continuing Legal Education and with the AAPL. Please indicate on your registration form where you are seeking credit. Application will be made for 630 minutes of continuing education, including 60 minutes of ethics. In states which calculate 50 minutes as a CLE hour, this will be 12.6 hours of CLE. In states which calculate 60 minutes for a CLE hour, this will be 10.5 hours of CLE credit. Complete information for reporting your credits will be available at the conference. Additional fees may be required for certain states/organizations.

You may pay by _____ check or _____ credit card. EMLF accepts MasterCard, VISA or American Express.

Card # _____ Expiration date _____

Signature _____ CVV code (security code) _____

Cancellation policy

Full refunds less a \$75 administrative fee will be given for written registration cancellations received by October 10. No registration refunds will be made thereafter, but substitutions can be made by calling the Foundation at 859.231.0271. Persons not entitled to any refund will receive meeting materials. EMLF members who cancel their registrations after October 10 receive materials and a \$100 credit toward a future program.

Three ways to register

- If registering online, go to www.emlf.org
- If registering by fax, call 859.226.0485
- If registering by mail, send form and payment to EMLF, 340 South Broadway, Suite 101, Lexington, KY 40508

Conference hotel information is on the back page



Energy & Mineral Law Foundation
340 South Broadway, Suite 101
Lexington, KY 40508

**Kentucky
Mineral Law
Conference**
October 19-20, 2016
**Hilton Lexington/
Downtown
Lexington, KY**

Conference Hotel

Accommodations for the conference are at the Hilton Lexington/Downtown, 369 West Vine Street, Lexington, KY 40507. The room rate is \$159 plus tax, currently at 13.4 percent, for reservations made through September 18 or sell out.

Call 1.859.231.9000 or toll free 1.877.539.1648 and ask for the EMLF Group rate. Check-in time is 3 p.m. and check-out time is noon. Cancellations must be made by 3 p.m. the day prior to arrival. Failure to cancel a guaranteed reservation prior to 3 p.m. on the day prior to arrival will result in a no-show charge. Or go to the EMLF website — www.emlf.org — for a link to online registration.

With a stay at Hilton Lexington/Downtown, you'll be centrally located in Lexington, steps from Lexington Visitors Center and Lexington Convention Center. This hotel is within close proximity of Victorian Square Mall and Lexington Opera House. Enjoy recreational amenities such as an indoor pool and a fitness center. Additional features include gift shops/newsstands, wedding services, and a television in the lobby.

Grab a bite at one of the hotel's three restaurants, or stay in and take advantage of room service (during limited hours). Quench your thirst with your favorite drink at a bar/lounge. Featured business amenities include a 24-hour business center, express check-out, and dry cleaning/laundry services. A roundtrip airport shuttle is complimentary at scheduled times.

Save the Date!

■ *May 21-23, 2017*
38th Annual Institute
Williamsburg, Virginia